

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

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| <div style="display: flex; justify-content: space-between; align-items: center;"><div style="width: 80%;"><p>JULITA E. PACLIBARE,<br/>appellant,<br/><br/>v.<br/><br/>VETERANS ADMINISTRATION,<br/>agency.</p></div><div style="width: 10%; text-align: center; font-size: 2em;">)</div></div> | ) | DOCKET NUMBER<br>CH07528310141 | DATE: <u>20 JUL 1984</u> |
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ORDER

Appellant has submitted a timely petition for review of the initial decision which sustained her removal from the position of Medical Technologist with the Veterans Administration (VA), effective November 19, 1982. The removal action was based on five sustained charges of falsification of laboratory records as to the results of medical tests the appellant made, and one sustained charge of entering a fraudulent reporting time on an agency personnel sign-in register.

Appellant first alleges error by the presiding official for admitting and considering certain evidence. A review of the appeal record, including the hearing transcript, reveals that the evidence objected to consists of copies of machine-produced tapes on which the results of medical tests are imprinted. The tapes were retrieved from trash receptacles in the appellant's immediate work area and were used by the agency to support the charges concerning the falsification of laboratory records of tests results. The appellant argues that the tapes were not competent evidence because they were undated, unsigned, and generally lacked identifying information to connect the documents to the appellant or her activities on the dates in question. Contrary to the appellant's assertion, however, the evidence shows that the retrieved tapes were

rationally related, by the agency, to the information hand-recorded by the appellant, and that the presiding official reasonably concluded that based on the sequentiality of numbers on the tapes, and the fact that the appellant used that particular machine, the tapes wholly represented the appellant's work product and were properly admissible as evidence. Thus, the appellant's argument goes to the probative value of the evidence. The factual errors alleged by the appellant are mere disagreement with evidentiary assessments which were based on the presiding official's evaluation of the evidence. Disagreement with a presiding official's factual determinations does not provide a basis for review by the Board. Weaver v. Department of the Navy, 2 MSPB 297 (1980).

The appellant next alleges that the burden of proof was improperly shifted to the appellant with respect to the absence of certain machine-produced tapes to support some of the test results hand-recorded by the appellant. The agency has the burden of proof with respect to the charges. 5 U.S.C. 7701(c)(1); 5 C.F.R. 1201.56. The appellant's failure or inability to provide certain evidence in her defense does not constitute a shifting of the burden of proof, but merely goes to the weight of the evidence to be considered by the presiding official. No error is shown by the presiding official with respect to the application of the burden of proof.

The appellant also contends that there was an erroneous interpretation of statute and regulation because the presiding official did not find that there was reversible procedural error in the agency's failure, contrary to agency regulations and an agency/union bargaining agreement, to initially have a complete evidence file established and available for the appellant's review when the notice of proposed removal was issued.

The agency decision cannot be sustained where an appellant shows harmful error in the application of the agency's procedures in arriving at such decision. 5 U.S.C. 7701(c)(2)(A). See also 5 C.F.R. § 1201.56(c)(3). It is incumbent upon appellant to prove that she was harmed by an agency procedural error, which was likely to have caused the agency to reach a different conclusion than the one reached, in the absence or cure of the error. See Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). Appellant confined her proof to the error rather than showing its effect, which is insufficient for a showing of harmful error. Payne v. Department of the Army, 6 MSPB 581 (1981). Thus, the appellant has failed to show that the agency error, if it was error, amounts to harmful error.1/

The appellant asserts that the initial decision by the presiding official is against the weight of the evidence and is clearly erroneous. Although the appellant enumerated some 46 transcript responses in support of this contention, those responses, singularly or collectively, do not show any error in the presiding official's factual findings. As noted supra, disagreement with a presiding official's factual determinations does not provide a basis for review by the Board. Weaver v. Department of the Navy, supra.

Lastly, the appellant argues that there was harmful delay in rendering the decision by the presiding official because the presiding official's ability to recall the demeanor and credibility of the hearing witnesses was impaired in rendering the decision some eight months after the hearing, contrary to 5 C.F.R. § 1201.111. Because

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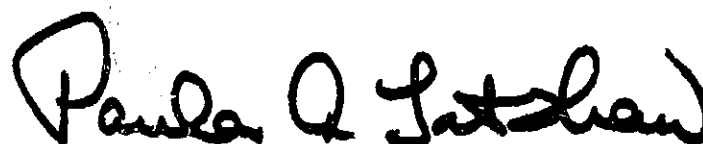
1/ The evidence shows that, while the agency evidence was not initially available for the appellant's review, it was subsequently furnished to her representative.

the appellant has shown no prejudice to her substantive rights with respect to the delayed decision by the presiding official, such does not constitute reversible error. Karapinka v. Department of Energy, 6 MSPB 114 (1981).

Accordingly, having fully considered appellant's petition for review, and finding it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition. This is the final Order of the Merit Systems Protection Board in this appeal. The initial decision of November 30, 1983, shall become final five (5) days from the date of this Order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of her right under 5 U.S.C. 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this Order.

FOR THE BOARD:

A handwritten signature in dark ink, reading "Paula A. Latshaw". The signature is written in a cursive, flowing style. The first name "Paula" is written with a large, looped 'P'. The last name "Latshaw" is written with a large, looped 'L' and a trailing flourish.

Paula A. Latshaw  
Acting Secretary

Washington, D.C.